STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 7, 2006
v	No. 257077 Wayne Circuit Court
DANIEL LEE BANNASCH, Defendant-Appellant.	LC No. 04-001565-01

Before: Cavanagh, P.J., and Cooper and Donofrio, JJ.

PER CURIAM.

Defendant Daniel Lee Bannasch appeals as of right his bench trial convictions of two counts of first-degree criminal sexual conduct (CSC).[1] He was sentenced to 9 to 15 years' imprisonment for each conviction. We affirm.

I. Facts and Procedural Background

Defendant's convictions arose from the alleged sexual abuse of his then five-year-old nephew in 1995. The complainant lived with the defendant and his wife, Verna Bannasch, for a short period of time in 1995, while his mother, Vicki Hancock, participated in an in-patient drug treatment program and his father served time in jail. The complainant, who was 14 years old by the time of trial, testified that defendant played a pornographic movie and instructed him to undress and lie on the floor. The complainant alleged that defendant then anally penetrated him, ejaculated into his mouth, and performed oral sex upon him. In fact, defendant *admitted* during a tape-recorded statement made to an investigating officer that he kissed the complainant's penis for approximately 30 seconds. The complainant stated that Mrs. Bannasch was home, but in her bedroom, during this incident.[2]

Although this incident occurred in 1995, formal charges were not brought against defendant until the fall of 2003. Ms. Hancock testified at a pretrial evidentiary hearing that her

[1] MCL 750.520b(1)(a) (sexual penetration of a person under the age of thirteen).

[2] Defendant conceded at oral argument that his stepchildren, who were then aged ten and twelve, potentially could also have been at home during the alleged incident.

son told her about the sexual abuse shortly after she returned from a rehabilitation center in October of 1995. She further testified that she immediately reported the incident to the Melvindale Police Department. Ms. Hancock claimed that an assistant prosecuting attorney with the Wayne County Prosecutor's Office told her that the complainant, who is developmentally delayed, was "too easily led" as a witness and that there was insufficient evidence to prosecute the defendant. However, the prosecutor in this case indicated that the prosecutor's office had no record of these events. Melvindale police sergeant Bradley Kropik further testified that there was no record that Ms. Hancock ever reported this incident to his department. The instant charges were filed when a Child Protective Services caseworker filed a police report after learning of the abuse in 2002 or 2003.[3]

II. Motion to Quash

Defendant asserts that the circuit court improperly denied his motion to quash the information or dismiss the charges against him, based on the eight-year delay between the date of the alleged incident and his ultimate arrest. Defendant contends that he was denied his due process right to a fair trial, as he lost the opportunity to question his wife, who died in the interim. Defendant further contends that he could not effectively cross-examine the complainant, as social workers, police officers, and the prosecutor had ample opportunity to coach the testimony of his impressionable nephew. While we are troubled by this lengthy delay, we agree with the trial court that dismissal of this action would be inappropriate under these circumstances.

We review a circuit court's decision on a motion to dismiss, or to quash an information, for an abuse of discretion.[4] The Speedy Trial Clause of the Sixth Amendment does not protect a defendant against lengthy prearrest delay, only from pretrial delay following an arrest.[5] Generally, a defendant is protected against unreasonable prearrest delay by the applicable statute of limitations.[6] Even so, a delay in bringing charges against a defendant may deny him the due process right to a fair trial where the prosecutor acts in a calculating manner to gain a tactical advantage or to deprive the defendant of the opportunity to defend against the charges.[7] Many things can happen during an eight-year period resulting in prejudice to the defendant at his or her

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[3] The complainant was briefly placed into foster care in 2002. He told his foster parents of the prior incident of sexual abuse. They, in turn, reported the incident to the caseworker.

[4] *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998).

[5] *United States v Lovasco*, 431 US 783, 788; 97 S Ct 2044; 522 L Ed 2d 752 (1977).

[6] *People v Bisard*, 114 Mich App 784, 788; 319 NW2d 670 (1982). Pursuant to MCL 767.24, both as it existed in 1995 and at the time of defendant's arrest and subsequent trial, the prosecution may bring charges against an individual for first-degree CSC involving a minor until the complainant reaches the age of 21. The charges in this case were clearly brought within that time period.

[7] *Lovasco*, *supra* at 797 n 19, quoting Amsterdam, *Speedy criminal trial: Rights and remedies*, 27 Stan L Rev 525, 527-528 (1975).

ultimate trial. Witnesses can disappear, evidence can be lost, and memories can fade.[8] However, a defendant may not rely on speculative dangers when challenging a violation of their rights on this ground.[9]

To establish a due process violation, the defendant bears the initial burden to demonstrate that he suffered "actual and substantial" prejudice as the result of a prearrest delay.[10] The burden then shifts to the prosecution to persuade the court that this delay was justified.[11] Defendant has failed to demonstrate, in this case, that he suffered "actual and substantial" prejudice as a result of the eight-year delay. Defendant did lose the opportunity to question his wife, a potential defense witness, regarding this incident. However, to demonstrate "actual and substantial" prejudice, the defendant must show "'that he was meaningfully impaired of his ability to defend against the state's charges to such an extent that the disposition of the criminal proceeding was likely affected.'"[12] In light of defendant's taped admission to the investigating officer, this witness's potential testimony, assuming that she would have testified favorable to the defendant, would have been of no value to his defense. Accordingly, defendant cannot meet his initial burden of demonstrating outcome-determinative prejudice.

Furthermore, even if the defendant had a viable defense to these charges, the prosecution presented sufficient evidence to persuade the court that this delay was justified. Despite an investigation by both the prosecution and the Melvindale Police Department, there is no factual record to support Ms. Hancock's claim that she immediately reported that her son had been sexually abused. Furthermore, there is no indication that the police committed any error in recording the purported 1995 report. Accordingly, even if the defendant could demonstrate that he suffered "actual and substantial" prejudice to his defense as a result of this delay, the prosecution met its burden of persuasion that the delay was neither tactical nor deliberate.[13]

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[8] See *People v Nuss*, 75 Mich App 346, 351-352; 254 NW2d 883 (1977) (finding that the defendant was prejudiced by an eight-year prearrest delay as the witnesses admitted that they could no longer remember many of the relevant circumstances and a material witness had died); *People v Fiorini (On Rehearing)*, 59 Mich App 243; 229 NW2d 399 (1975) (although this Court found that the defendant was not prejudiced by a 41-month prearrest delay, the panel noted that one alibi witness had died and the investigating officers had lost their original case notes); *People v Hernandez*, 15 Mich App 141, 145-146; 170 NW2d 851 (1968) (following a 42-day prearrest delay, the defendant could not remember his whereabouts on the night of the offense and no physical evidence of the alleged drug transaction existed).

[9] *Adams*, *supra* at 135.

[10] *Id.* at 134-135.

[11] *Id.*

[12] *Id.* at 135, quoting *Jones v Angelone*, 94 F3d 900, 907 (CA 4, 1996).

[13] *Id.* at 140-141.

III. Ineffective Assistance of Counsel

Defendant also contends that he was denied the effective assistance of counsel, as defense counsel erroneously based the motion to quash on the Speedy Trial Clause, failed to vigorously argue and advocate in support of that motion and in support of his innocence at trial, and conceded at trial that defendant admitted his guilt. Absent a *Ginther*[14] hearing, our review is limited to plain error on the existing record, affecting defendant's substantial rights.[15] Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise.[16] To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently.[17] Defendant must overcome the strong presumption that counsel's performance was sound trial strategy.[18]

We agree that defense counsel was remiss, both at and before trial. Counsel clearly *would* have been constitutionally ineffective *if* his errors had been outcome determinative. Defense counsel did erroneously base the motion to quash the information or dismiss the charges on the Speedy Trial Clause of the Sixth Amendment. As previously noted, the Sixth Amendment is inapplicable to challenges regarding a delay in bringing formal charges.[19] Although defense counsel clearly committed legal error, the trial court properly considered defendant's motion as raising a violation of his due process right to a fair trial. Accordingly, defense counsel's error did not affect the outcome of the proceedings.

Defense counsel's performance at the motion hearing also does not warrant reversal. It is true that defense counsel presented no witnesses at either proceeding. Counsel could have questioned those individuals whom defendant alleged had "coached" the complainant's testimony. The prosecution included these individuals on its witness list; however, defense counsel stipulated that the prosecution need not call them at trial. Defense counsel also could have questioned the prosecution's witnesses more extensively on cross-examination. Yet, the failure to call or question a witness constitutes ineffective assistance only if the failure deprived the defendant of a substantial defense; i.e., one that might affect the outcome of the trial.[20] Again, in light of defendant's admission, no further witnesses or testimony could have assisted his defense. Therefore, any error or omission on the part of defense counsel in this regard was not outcome determinative.

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[14] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[15] *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

[16] *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

[17] *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

[18] *Id.* at 600.

[19] *Lovasco*, *supra* at 788.

[20] *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Finally, defendant challenges defense counsel's statement during closing argument at his bench trial that "[r]egarding the penis in [defendant's] mouth, I think the Court already has that evidence and can proceed with that, but as to the other Counts, I believe there is a reasonable doubt." Defense counsel went on to argue that there was insufficient evidence to support defendant's conviction with regard to the remaining alleged acts of abuse. Although defense counsel conceded defendant's guilt on one count of CSC, defendant has not overcome the presumption that this concession was sound trial strategy. This Court has found that, where there is strong evidence pointing to a defendant's guilt, it may be strategically wise to concede to those charges while contesting others.[21] In light of defendant's taped admission to investigating officers that he did, in fact, kiss the complainant's penis, defense counsel's concession likely did not change the trial court's ultimate judgment. This concession was not outcome determinative.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper
/s/ Pat M. Donofrio

[21] *People v Matuszak*, 263 Mich App 42, 60; 687 NW2d 342 (2004).